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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1928.**

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**No. 940 116**

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FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., PETITIONER,

*v.*

THE UNITED STATES OF AMERICA.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
*Counsel for Petitioner.*

(34,249)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

# No. 940

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., Petitioner,

v.

THE UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Supreme Court of the United States:*

Your petitioner, Florsheim Brothers Drygoods Company, Ltd., respectfully petitions this Honorable Court to grant a writ of certiorari to the Honorable United States Circuit Court of Appeals, Fifth Circuit, and to remove therefrom to this Honorable Court for review the record in the case there lately pending entitled Florsheim Brothers Drygoods Company, Ltd., plaintiff and appellant, v. United States of America, defend-

ant and appellee, being case No. 5295 on the docket of that Court. A certified copy of the record therein is presented herewith.

**Statement of the Case.**

This action originated in the United States District Court for the Western District of Louisiana, Shreveport division, the jurisdiction of said Court being based on the fact that it was an action against the United States arising under an act of Congress, being for the recovery by this petitioner of $11,517.57 with interest, as income, war profits and excess profits taxes paid under protest for the year 1918.

The trial of the cause resulted in a judgment in favor of the defendant rejecting the plaintiff's demands, reported in 26 Fed. (2nd) 505. The case was taken by petitioner on appeal to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, which court, on December 19, 1928, rendered a decree affirming the judgment of the lower court (R. 60). On January 7, 1929, application for rehearing was duly filed (R. 61) and refused March 1, 1929 (R. 69) (29 Fed. (2nd) 895). Whereupon petitioner requested that the mandate be stayed until application for this writ of certiorari could be made.

Your petitioner respectfully represents that said Court of Appeals was in error in affirming the judgment of the lower court.

**Summary Statement of the Matters Involved.**

As stated by the Court of Appeals, on March 15, 1919, petitioner filed a tentative tax return for the

year 1918 and received extension of time for filing of its completed return, which was made on June 14, 1919. On March 1, 1924, petitioner and the Commissioner of Internal Revenue signed an instrument in form shown on page 46 of the record, consenting to a determination, assessment and collection of the amount of said tax due under return filed by petitioner for the year 1918 during a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year mentioned.

The additional taxes here involved were *claimed* to have been assessed on June 11, 1925, but the audit notation on the return (photostatic copy following page 44 of record), notice of the Treasury Department of assessment (R. 47-48) and the notice and demand for income tax (R. 50), which constitutes all of the evidence showing assessment, does not show that any assessment whatever was made by the Commissioner of Internal Revenue as required by law.

The taxes were paid under protest on dates later than June 14, 1925. Under Section 250 (*d*) of the Revenue Act of 1921 (42 Stat. 264) it was required that taxes for prior years should be returned and assessed within five years "after the return was filed unless the Commissioner and tax payer consent in writing to a later determination, assessment and collection, and no suit or proceeding for the collection of such tax * * * shall be begun after the expiration of five years after the date when such return was filed."

Contention was made below and is here urged that:

1. There is no proof whatsoever in the record that any legal assessment was made by the commissioner as required by law;

2. That the five year period of proscription began to run from the date of the tentative return in March, 1919;

3. That the "consent in writing" between the tax payer and the commissioner, authorized by Congress, was a mutual agreement by which the tax payer extended the time of the Government within which the taxes should be determined, assessed and collected and the Government, on its part, agreed that all three of these things should be done within that time, otherwise they would be proscribed.

**Specifications of Error.**

1. The Court erred in holding that "the additional taxes here involved were assessed on June 11, 1925, when there is not a scintilla of evidence in the record that the Commissioner himself ever made any assessment whatever as required by Section 3182 of the Revised Statutes of the United States.

2. The Court erred in holding that "the consent in writing (R. 46) simply served to enlarge the period of limitation and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the tax" and did not change the existing rights of the parties.

3. The Court erred in holding that the period of limitation for the assessment and collection of taxes began to run from the date of the filing of the completed return instead of from the date of the filing of the initial return.

4. The Court erred in holding that the case does not in any wise differ in principle from the case of United States *vs.* Crooks, 18 Fed. (2nd) 449.

5. The Court erred in refusing and failing to hold that the collection of the taxes involved was barred, at the time of its payment, under the provisions of Sec. 277 (*a*) (2), and 278 (*c*), (*d*) and (*e*) of the Revenue Act of 1924; Sec. 278 (*d*) of the Revenue Act of 1926 and Sec. 278 (*d*) of the Revenue Act of 1928.

**Grounds of Application For This Writ.**

Petitioner respectfully represents that important questions of Federal law are involved which have never been, but should be, settled by this Honorable Court; that they are of great public interest, affecting thousands of tax paying citizens and the Internal Revenue Department of the Government, involving millions of dollars of taxes; that in the District Court for the Eastern District of South Carolina Judge Ernest F. Cochran on March 30, 1929, in the case of Brandon Corporation *vs.* John F. Jones, Collector (unreported in the advance sheets) decided contrary to the decision of the Circuit Court in this case in holding that the period of limitation for the assessment and collection of taxes began to run from the date of filing of the

so-called tentative or initial return and not from the filing of the so-called final report; that in the District Court for the District of Massachusetts, on August 29, 1928, Judge Lowell, in the case of Hood Rubber Company *vs.* White, Collector (28 Fed. (2nd) 54), held contrary to the decree of the Court in this case and held that the collection of the tax was barred after the period stipulated in the consent or so-called waiver, thereby giving the effect to such consent as being a binding obligation on the Government as well as the tax payer (the last cited case now pending before the U. S. Circuit Court of Appeals for the First Circuit, bearing No. 2338 and having been argued before that Court April 15, 1929, but not yet decided).

Your petitioner respectfully represents that this writ should be granted in order that the important questions of federal law so presented may be determined by this Honorable Court so that the taxing department of the Government, the various courts in which cases are now pending, and the tax paying citizens, may have their rights finally settled and adjudicated.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Honorable Court directed to the said Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans, Honorable Richard W. Walker, Nathan P. Bryan and Rufus E. Foster, Circuit Judges, commanding the said Court to certify and send to this Honorable Court on a day to be designated, a full and complete transcript of the record of proceedings of said Circuit Court of Appeals

had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and on final hearing that the said decree of the Honorable Circuit Court of Appeals be reversed by this Honorable Court, and for such other relief as may be proper, and for all of which your petitioner will ever pray.

E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
*Counsel for Petitioner.*

ALLEN RENDALL,
A. B. FREYER,
*Of Counsel.*

STATE OF LOUISIANA,
*Parish of Caddo:*

Before me, the undersigned authority, personally came and appeared Bernard H. Florsheim who being by me first duly sworn deposes and says that he is President of the Florsheim Brothers Drygoods Company, Ltd., that he has read the foregoing petition and the facts stated therein are true to the best of his information and belief.

BERNARD H. FLORSHEIM.

Sworn to and subscribed before me this May 25th, 1929.

[SEAL]

E. B. HERNDON
*Notary Public Caddo Parish, La.*

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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1928.**

# No. 940

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA, RESPONDENT.

## PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We shall at this time content ourselves with a brief argument in connection with the specification of errors contained in the accompanying petition for writ.

> *First Specification:* "The Court erred in holding that 'the additional taxes here involved were assessed on June 11, 1925' when there is not a scintilla of evidence in the record that the Commissioner himself ever made any assessment whatever as required by Section 3182 of the Revised Statutes of the United States."

The only evidence whatever in this record tending in any manner to show an assessment as having been

made was contained at three places in the record. The notice of date June 10, 1925 (R. 47-8) addressed to petitioner advising it that an assessment of additional taxes had been made was signed J. G. Bright, Deputy Commissioner by I. T. Fluss, Chief of Section (R. 48). The "notice and demand for income tax" (R. 50) dated June 18, 1925, bears no signature whatever and certainly evidences no actual assessment made by the Commissioner himself. The audit notice on the return itself (photostatic copy on record sheet immediately following page 44 of record) shows that the same was audited by I. Graff.

Section 3182 of the Revised Statutes of the United States reads as follows:

> "Sec. 3182. The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal revenue act, where such taxes had not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified."

Section 250 (*d*) of the Revenue Act of 1918 likewise provides as follows:

> "Sec. 250 (*d*). Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or

> was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

It will thus be seen that the law requires that the assessment be made by the Commissioner himself and in the absence of any proof in the record that it was so made we feel that we are justified in charging no error the finding by the court that the additional taxes are "assessed by the Commissioner" on the date stated.

Specifications two and five will be discussed together later.

> *Specification Three:* "The Court erred in holding that the period of limitation for the assessment and collection of taxes began to run from the date of the filing of the completed return instead of from the date of the filing of the initial return."

In presenting memorandum in relation to this specification we beg leave of the Court to quote from the opinion of Judge Ernest F. Cochran in the case of Brandon Corporation vs. Jones, Collector of Internal Revenue, in the District Court of the United States for the Eastern District of South Carolina, No. L-207 (not yet reported in the advance sheets) which directly decided the matter presented by this specification contrary to the decision of the Court in the present case. In the opinion referred to Judge Cochran said:

"It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the Government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the Government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919 and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns and it necessarily follows that the return which he then required, must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

But the tentative return was sufficient to constitute a return in another aspect. Section 250 (*c*) of the same Act (40 Stats. 1083) provides that if any tax remains unpaid after it is due and for ten days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the case of the first instalment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith and was a sufficient notice and demand to make the first instalment payable in March 15, 1919.

Moreover, the Commissioner of Internal Revenue has always considered that assessments may be properly made on such tentative returns. For examples of assessments thus made, see Matteawan Mfg. Co. 14 B. T. A. 789, and Arthur H. Lamborn et al, 13 B. T. A. 177.

Again, form 1031-T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.

* * * * * * *

The law clearly contemplates, so far as the starting of the statute of limitation is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented *bona fide*, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The Government cannot blow hot and cold. It cannot say to the taxpayer, "file a paper which we know to be incomplete and does not give all the information required by law, and pay us the first instalment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return," and then say later, that "the first paper which you filed was no return and the statute must start from the date of the final completed return." It cannot say, when its interests require it to do so, that the tentative return is a return and then when its interests require the contrary, say that it is no return."

> *Specification Four*: "The Court erred in holding that the case does not in any wise differ in principle from the case of United States *vs.* Crooks, 18 Fed. (2nd) 449."

From a reading of the Crooks case it will be noted that the taxes there involved were for the calendar year *1919* and under the Act of 1921 the statutory period therein provided within which to make the assessment had not elapsed before the enactment of the Act of 1924 and in the Crooks case there was no waiver or consent whatever involved, as in the case at bar. In the case at bar the tax involved was for the calendar year 1818 and the *statutory period* provided by the Act of 1921 had already elapsed before the enactment of the Act of 1924, which substantially and seriously distinguishes the case at bar from the Crooks case.

> *Specifications Two and Five*: "2. The Court erred in holding that 'the consent in writing (R. 46) simply served to enlarge the period of limitation and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the tax,' and did not change the existing rights of the parties."
>
> "5. The Court erred in refusing and failing to hold that the collection of the taxes involved was barred, at the time of its payment, under the provisions of Sec. 277 (*a*) (2) and 278 (*c*) (*d*) and (*e*) of the Revenue Act of 1924; Sec. 278 (*d*) of the Revenue Act of 1926 and Sec. 278 (*d*) of the Revenue Act of 1928."

In support of our position in connection with these specifications we beg leave to quote from the opinion

of Judge Lowell in the suit of Hood Rubber Company *vs.* White, Collector, in the United States District Court of Massachusetts, decided August 29, 1928, 28 Fed. (2nd) 54, which passed directly on the question here involved as follows:

> "The government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The government takes advantage of the six-year period for assessment, and then says that the six-year period for collection was changed by the later statute of 1924 (26 U. S. C. A., section 1061), which allowed six years after a valid assessment for collection. The government cannot have its cake and eat it too. Either the waiver conferred no power on the government to make the assessment later than the statutory period allowed, or it set up a six-year restriction on collection as well as assessment. It is distinctly unfair for the government to take advantage of one part of the waiver and refused to be bound by the other part of it. The statement made in the government's brief and in some of the cases, that the waiver was made by the taxpayer and the Commissioner with future statutes in view, seems far-fetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the six-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind.
>
> The government cites cases to the effect that 'no officer of the government has the right to waive the statute of limitations in favor of the

United States.' See, for instance De Arnaud *vs.* United States 151 U. S. 483, 14 S. Ct. 374, 38 L. Ed. 244. These cases are sound law, but they apply only to statutes of limitation then in force, and not to ones which are prescribed by Congress in later acts. In this case the Commissioner did not waive a statute of limitation; it was the taxpayer who waived it and gave more time to the Commissioner to assess and collect the taxes.

(2) The government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation should be extended and it was of special advantage to the plaintiff that it should know when the taxes might be considered as unenforceable, so that it might properly arrange its financial affairs. This seems to be clearly a case of a binding contract, which cannot be varied by subsequent legislation. C. & N. W. Ry. Co. *vs.* United States, 104 U. S. 680, 26 L. Ed. 891."

We therefore respectfully urge the Court to grant the writ of certiorari and after due proceedings to sustain the contention of this appearer, and for all general and equitable relief.

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